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No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1948

H. P. HOOD & SONS, INC., PETITIONER

v.

C. CHESTER DuMOND, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, affirming an order of the Appellate Division of the Supreme Court of that State, is reported in 297 N. Y. 209, 78 N. E. (2d) 476. The opinion of the Appellate Division is reported in 271 App. Div. 394, 66 N.Y. S. (2d) 732.

JURISDICTION

The judgment of the Supreme Court for the County of Albany was entered on March 18, 1948 (R. 109), as directed by remittitur from the Court of Appeals issued on March 12, 1948 (R. 107). The petition for a writ of certiorari was filed on June 11, 1948 and was granted on October 11, 1948 (R. 117). The jurisdiction of this Court rests on Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statutes involved are Article 21 of the Agriculture and Markets Law of the State of New York and the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U.S.C. §§601 *et seq.*, which reenacts and amends the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended by the Act of August 24, 1935 (49 Stat. 750). The pertinent provisions of these statutes are set out in the Appendix, *infra*.

The federal regulation involved is Order No. 4 as amended which regulates the handling of milk in the Greater Boston, Massachusetts, marketing area (United States Department of Agriculture, Production and Marketing Administration, Title 7, Code of Federal Regulations, Part 904).

QUESTIONS PRESENTED

1. Whether a state order denying a license to purchase and ship milk in interstate commerce on the ground that such operations will tend to increase the costs of competing dealers and to divert supplies from local markets obstructs interstate commerce in violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

2. Whether such an order conflicts with existing federal laws regulating the handling of milk in interstate commerce.

STATEMENT

The petitioner, a Massachusetts corporation, is a milk dealer engaged in purchasing milk in the New England states and the State of New York, shipping it to Boston, Massachusetts, and selling it in the Boston market for fluid consumption (R. 4,

14). It has purchased milk in New York for shipment to Boston since about 1900 (R. 36). It operates three milk plants in that state, at Eagle Bridge, Salem and Norfolk, at which milk is received for such out-of-state shipment (R. 10, Finding 2; R 111). All its purchases of milk for shipment to Boston are subject to Federal Milk Order No. 4, as amended, issued under the Agricultural Marketing Agreement Act (Appendix, *infra*, p. 52), regulating the handling of milk sold in the Greater Boston marketing area (R. 30, 40-41, 151-52).

Article 21 of the Agriculture and Markets Law of New York (Appendix, *infra*, p. 46), provides that no milk dealer may buy milk from producers, or deal in, handle, sell or distribute milk in New York, unless licensed to do so by the Commissioner of Agriculture and Markets (Section 257). To obtain a license a dealer must pay a substantial fee (Section 258-a) and execute and file a surety bond, in a sum not less than two thousand dollars, conditioned on the prompt payment of all amounts due to producers for milk sold by them to the licensee (Section 258-b). The Commissioner may not grant a new license or authorize the extension of an existing business unless satisfied "that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business" (Section 258-c). Nor may he do so unless also satisfied "that the issuance of of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license will be in the public interest" (Section 258-c). In addition the Commissioner is authorized to refuse to grant or renew a license, and to suspend or revoke a license already granted, if satisfied that the applicant has failed to meet other condition designed to insure his

responsibility, honesty and compliance with the law (Section 258-c, subparagraphs (a) to (n), inclusive).

The petitioner is, and for some years has been, duly licensed by the Commissioner to purchase milk from producers at its three New York plants, at Eagle Bridge, Salem and Norfolk (R. 4, 14, 20, 85, 111). On January 30, 1946, it applied for an extension of its license to permit it to purchase milk from producers at an additional plant, formerly operated by another dealer, at Greenwich, New York (Ex. 4, R. 86). A hearing on the application was held on March 25, 1946 (R. 21-77; Ex. 1, R. 77). The petitioner had also applied, on March 1, 1946, for a renewal of its existing license (Ex. 5, R. 86) and it was stipulated at the hearing that all evidence received should be considered in connection with both applications (R. 23).

At the hearing, milk dealers competing with the petitioner in the vicinity of Greenwich strenuously opposed any extension which would permit the petitioner to buy and receive milk at Greenwich.[1] They complained that the petitioner was not subject to the same health regulations applicable to dealers selling in New York State (R. 43-44, 62, 64-65, 70-71), that OPA ceiling prices favored the petitioner and dealers selling in the metropolitan New York market (R. 53-54, 70, 75), and suggested that the Federal Milk Order applicable to the Boston marketing area gave the petitioner a competitive advantage (R. 34-35, 65). Evidence was introduced as to a temporary short-

[1]They included the Borden Company, Dairymen's League, Sheffield Farms, Middletown Milk & Cream Company, Vermont Milk & Cream Company, Washington and Rensselaer County Co-operative Association, Gold Medal Farms, Inc., and General Ice Cream Company (R. 21-22).

age of supply in the Troy market during the fall and winter of 1945-46 (R. 52, 61, 72). It was strongly urged that the petitioner should not be allowed to purchase additional supplies of milk or take on producers delivering to other dealers (R. 56, 60-61, 62, 72, 74-75).

After hearing, the Commissioner denied the application for an extension of the license to permit purchases at Greenwich, and simultaneously renewed the petitioner's license so far as its existing business in New York was concerned (R. 8-9). As required by the statute, he filed a memorandum of his decision (R. 17) setting out his findings of fact and his conclusion thereon (R. 9-13).

He found, and the evidence established, that the business which the petitioner proposed to conduct at Greenwich, like its business at its other plants in New York, would consist merely of purchasing milk and shipping it in fluid form, without processing, directly to Boston, Massachusetts (R. 10, Findings 6, 11 and 12; R. 24-25). He further found that the petitioner had had difficulty in complying with the requirements of the Board of Health of Boston, Massachusetts (in which city the milk was sold) with respect to cooling milk before shipment because of the inability of its existing plants to handle the volume of milk delivered to them (R. 10, Finding 8); that it proposed to divert to the plant at Greenwich some milk deliveries from producers living in that vicinity who were currently delivering to its plants at Eagle Bridge and Salem (R. 10, Finding 13; R. 12); that such producers would save hauling expense by making deliveries to the new plant (R. 11, Finding 17); and that the petitioner intended to "take on 20 or 30 new producers" at Greenwich in addition to those who might shift from its plants at Eagle Bridge and Salem (R. 11, Finding 16; R. 12).

The Commissioner concluded that if producers currently delivering to competing dealers in the vicinity should shift to the petitioner's new plant, it would tend to reduce the volume of milk handled by such dealers and thus to increase their costs (R. 12). Further, if such a shift occurred, it would tend to deprive local markets such as Troy, of supplies needed during the short season (R. 12). For these reasons, he determined that the extension "would tend to a destructive competition in a market already adequately served and would not be in the public interest" (R. 13), and, therefore, denied the extension (R. 8-9, 13).

In proceedings to review the Commissioner's denial of the extension, the Appellate Division of the Supreme Court of New York sustained his determination (R. 101-103). On appeal, the Court of Appeals affirmed (R. 107), holding that, on the basis of the Commissioner's conclusion that "petitioner's proposed new branch would have a tendency to draw customers and milk away from local markets, and set up undesirable competition between petitioner and other dealers" (R. 114), his refusal to extend petitioner's license was a permissible regulation of interstate commerce, and that there was no conflict between the Commissioner's order and federal regulation of interstate commerce in milk (R. 115).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a state may deny a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets.

2. In holding that denial on such grounds of a license to purchase milk in interstate commerce and ship it out-of-state is not a violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

3. In holding that an order denying a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets does not conflict with the Agricultural Marketing Agreement Act and Federal Milk Order No. 4, as amended.

4. In holding that such an order is not a violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) because in conflict with federal laws regulating interstate commerce in milk.

5. In holding that the findings and evidence on which the order of the Commissioner of Agriculture and Markets was based warranted denial of a license to purchase milk in interstate commerce and ship it out-of-state.

6. In sustaining the order of the Commissioner of Agriculture and Markets denying the petitioner's application for an extension of its license.

SUMMARY OF ARGUMENT

I. The license which the petitioner has been denied is a license to engage in interstate commerce. The petitioner's only activity at Greenwich will be that of buying milk for immediate and direct shipment out of the state. Such purchasing constitutes interstate commerce.

The petitioner has satisfied the requirements of the New York statute as to financial responsibility and good character, and has paid the required license fee and furnished the required bond. The Commissioner renewed its license to continue its business at its present locations. He denied it the right to make interstate purchases at Greenwich, not because of the character of its business, but because that market is "already adequately served" and local supplies are short. The avowed purpose and practical effect of his order is to prevent the petitioner's obtaining milk from farmers not now selling to it. Thus it limits the amount of milk the petitioner can buy for out-of-state shipment. The order does not merely regulate the conditions under which interstate commerce can be carried on. It restricts the quantity of that commerce.

It is no answer to say that interstate commerce is not restricted because the petitioner is legally free to buy all the milk it wants at its other plants in the state. Since farmers pay the cost of hauling milk to the dealer's receiving station, the location of the station with relation to the farms is a vital factor governing a dealer's ability to get milk. Legal freedom to buy unlimited quantities of milk at one location is not the practical equivalent of the right to buy it at two. That was the assumption upon which the Commissioner denied the license. The express purpose of that denial was to preclude the petitioner's "taking on" producers in the Greenwich area currently delivering to other dealers. He cannot now say that he prevented such diversion of milk to protect local dealers and consumers, and at the same time assert that petitioner's interstate trade is not in fact restricted.

II. The marketing of fluid milk is a matter of substantial national concern. Because of its

multi-state character, milk marketing can be effectively regulated only by a single national authority. The Agricultural Marketing Agreement Act and the federal milk orders issued under it provide such regulation. That regulation was designed to remove the restrictions on interstate trade in milk which resulted from excessive competition and seasonal variations in production.

Obstructions to interstate marketing of milk would vitally affect the supply of both New York and Massachusetts. About one third of New York's own supply is derived from other states. The Boston market is even more dependent on outside sources. About 90% of its supply comes from states other than Massachusetts and almost 10% is now furnished by the State of New York.

Against this national interest in preserving unimpeded interstate marketing of milk, the Commissioner asserts the interest of local dealers in freedom from competition and of local consumers in maintaining the supply for their own use. In concluding that to permit the petitioner to purchase at Greenwich would "tend to a destructive competition in a market already adequately served", he reasoned that the petitioner might divert some milk from competing dealers in the area, which, by reducing their volume, might increase their costs. Any increase in costs, he assumed, might destroy their ability to compete. In short, if a market is once "adequately served", all newcomers must be excluded since they may acquire part of the supply and thus may affect the costs to dealers already in the field. The basic philosophy behind the Commissioner's conclusion is that the milk business in each area is to be frozen for the benefit of dealers already doing business there.

Whatever may be the state's power, so far as purely intrastate trade is concerned, to confer a

monopoly on those already in business, it cannot restrain interstate commerce for the purpose of protecting existing business, whether local or interstate, from competition. Such suppression or limitation of the normal consequences of commerce among the states is forbidden by the commerce clause.

The Commissioner's order derives no additional support from his finding that the supply of fluid milk was inadequate in some local markets during the fall and winter of 1945-1946. Similar seasonal deficiencies in supply have existed in eastern metropolitan markets since 1943 and federal authorities have taken action to deal with that problem. It is settled that a state is powerless to restrain interstate commerce in lawful articles of trade on the ground that they are needed by the people of the state.

III. The Commissioner's order conflicts with the objectives of the Agricultural Marketing Agreement Act and orders issued thereunder regulating the handling of milk in interstate commerce. The basic purpose of the Act was to foster and encourage interstate commerce in agricultural commodities. In the case of milk, this purpose is achieved through the issuance of orders by the Secretary of Agriculture fixing and equalizing the prices to be paid producers. The Act expressly prohibits any limitation on the amount of milk that can be purchased or sold in interstate commerce. The Secretary has issued orders under the Act, one of which, Order No. 4, regulates the prices to be paid producers by handlers selling in the Boston, Massachusetts, market. That order governs all petitioner's purchases in New York and elsewhere. By restricting the amount of milk that the petitioner can buy and limiting the producers

from whom it may obtain milk, the Commissioner's order accomplishes what federal regulation seeks to prevent. It hampers the operations of federal milk orders and frustrates the federal policy of encouraging interstate milk marketing.

ARGUMENT

I

Interstate Commerce in Milk is Restricted by The Order in Question

A. The purchase of milk for out-of-state shipment constitutes interstate commerce

As the court below said (R. 113): "Petitioner's whole business, present and proposed, is interstate commerce." The license which has been denied is a license to make interstate purchases of milk. The findings of the Commissioner, and the uncontradicted evidence before him, establish that the petitioner's only activity at Greenwich will be that of buying milk from farmers for direct shipment out of the state. Immediately upon its receipt at that plant from producers, the milk will be weighed, tested, cooled and shipped in tank cars or tank trucks to Boston, Massachusetts (Finding 11, R. 10; R. 24; R. 25). No milk will be manufactured or otherwise processed at Greenwich (Finding 12, R. 10; R. 24; R. 25). All milk purchased will be shipped directly for sale in the Boston market (R. 24; R. 25). The petitioner sells no milk in New York (R. 88, Ex. 5, p. 2, items 15, 15a) and does not seek a license to sell within the state.

Purchasing milk for shipment and sale outside the state is not a local activity. It constitutes interstate commerce. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 568; *Currin* v.

Wallace, 306 U. S. 1, 10; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 687-88; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Shafer* v. *Farmers Grain Company*, 268 U. S. 189, 198; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-291.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation." *Currin* v. *Wallace*, 306 U. S. 1, 10.

Purchases of milk similar to those of the petitioner were held in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, to be interstate commerce. It was there argued that sales by dairy farmers at a country plant in New York to a milk dealer who resold in interstate commerce were local transactions, completed before interstate commerce began. This Court rejected the argument, saying (at p. 568):

> "But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce."

Cf. Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, 350.

B. THE ORDER LIMITS, AND IS INTENDED TO LIMIT, THE AMOUNT OF INTERSTATE COMMERCE

We do not contend that, because the petitioner's business is wholly interstate, it is immune from all the requirements of the New York licensing statute (Sections 257-258j, Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 46 to 52). We recognize that a state may require interstate purchasers of milk to be licensed and

bonded in order to prevent fraud and to insure financial responsibility and honest dealing. *Robertson* v. *California*, 328 U. S. 440; *California* v. *Thompson*, 313 U. S. 309; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346. The provisions of the New York statute directed to that end have been complied with. The petitioner filed the required surety bond in the amount of $40,000 (Ex. 5, p. 1, item 9), and paid a license fee of $1,645 (Ex. 5, p. 4, item 26). The Commissioner was satisfied that the petitioner met all the statutory requirements as to financial responsibility, good character and ability to carry on its business properly. (See Sections 258c (a) to (n), Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 49 to 51). In the very order in which he denied a license to engage in interstate purchasing at Greenwich, he renewed the petitioner's license to continue its existing business at its other plants in New York (R. 13, 19-20).

The present case thus differs from those in which this Court has sustained state statutes requiring a license to engage in interstate commerce. There the broad issue was whether the state had power to impose any licensing requirements on the activities in question. In *Robertson* v. *California*, 328 U. S. 440, 446-47, for example, the Court said:

> "Appellant has not sought to obtain a license under the Code provisions, has not been denied one, and has not attacked any particular requirement. His charge is wholesale, not particular."

Wholesale also was the attack in *California* v. *Thompson*, 313 U. S. 309; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Duckworth* v. *Arkansas*, 314 U. S. 390; *Milk Control Board* v. *Eisenberg*

Farm Products, 306 U. S. 346; and *Hartford Accident & Indemnity Co.* v. *Illinois*, 298 U. S. 155. Here the issue is a narrower one. The petitioner applied for and was refused a license on specified grounds. It is the validity of that denial which is alone in question.

By barring the petitioner from making interstate purchases at Greenwich, the Commissioner's order obstructs interstate commerce in milk. Quite different was the situation in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, where under the statute in question milk dealers were free to conduct interstate business in any locality in the state upon filing the required bond and paying farmers the minimum price fixed by the Board. As this Court pointed out (at p. 352): "The Commonwealth does not essay to regulate or restrain the shipment of respondent's milk to New York." Just such restraint, however, is the result of the order here. The distinction is plain between regulating the conditions under which interstate purchases may be made and restricting the right to make them. The petitioner does not have the remedy here of making such purchases if it complies with the state's regulatory conditions (*Cf. Robertson* v. *California*, 328 U. S. 440, 460; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346). It is excluded from the Greenwich market, not because of the nature of its business or the manner in which it is conducted, but because that market is "already adequately served" and local supplies have been short.

There is no merit in the suggestion of the court below that there is in fact no restriction of interstate commerce because "Petitioner, under its present, unenlarged license, may still buy, at its Eagle Bridge, Salem and Norfolk locations, as much milk

as it can get, and may send it where it will" (R. 114). This is to say, in effect, that if interstate trade is permitted in one or more localities within a state, barring it from other localities does not restrict it. If a state could thus circumscribe the area in which interstate commerce may be conducted, it would have an easy means of preventing out-of-state competition. By licensing interstate operations in localities where it would be impracticable or uneconomical to carry them on, the state could effectively block the flow of commerce.

The fallacy of that suggestion is demonstrated in the petitioner's case. The Commissioner found that the petitioner has experienced difficulty in handling milk at its Eagle Bridge and Salem plants because the volume received was too great to permit its being cooled in conformity with the requirements of the Boston Board of Health (R. 10). There was testimony that as a result milk had been rejected by that Board (R. 24-25). That was the primary reason the petitioner sought the license in question (R. 24-25; R. 86, Ex. 4). The petitioner's plant at Norfolk is, as the opinion below points out, "in another part of New York state, and serves a different area and a different group of milk producers" (R. 111). Freedom to buy "all the milk it can get" at its existing plants does not meet the petitioner's need to receive and ship milk at Greenwich.

Moreover, as a practical matter, the Commissioner's order effectively limits the total amount of milk which the petitioner can buy and ship in intersfate commerce. Milk is delivered by farmers at the country station and they pay the trucking cost of hauling the milk from their farms to the plant (R. 43, 67). A reduction in the hauling dis-

tance saves the farmer trucking costs and tends to attract his business. Thus the amount of milk which a dealer can get turns on the geographical location of his plant. A geographical disadvantage may perhaps be offset if the dealer himself pays the trucking expense or equivalent subsidies (*Cf.* R. 67-8). But that, of course, increases his costs. Plainly, legal freedom to buy unlimited quantities of milk at one location is not the practical equivalent of the right to buy milk at two. By refusing to permit the petitioner to receive milk at Greenwich the Commissioner has in fact restricted the amount of the petitioner's interstate purchases. Such, of course, is the avowed purpose of the order. It was precisely because at Greenwich the petitioner might be able "to secure 20 or 30 additional producers who are not now delivering to any of their plants" (R. 12) that the license was denied.

If, as the court below suggests, the order imposes no practical obstacle to the petitioner's interstate purchasing, it serves no purpose whatsoever. The very basis for the order was that protection of local dealers and consumers made it necessary to prevent diversion to the petitioner of milk from the Greenwich area. If such diversion is not prevented, then local interests are not protected and the very purpose of the order completely disappears. Plainly the state cannot have it both ways: that local conditions make it necessary to limit the petitioner's interstate purchases at Greenwich, and yet that petitioner's interstate trade is in fact not at all restricted.

II

The Restriction Imposed by the Order in Question Unconstitutionally Obstructs Interstate Commerce

As in all cases involving the validity of state regulation of commerce, the ultimate issue here is "whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference" (*Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769).

The validity of state regulation is to be tested by ascertaining whether the subject matter regulated is one "which because of its local character and the practical difficulties involved may never be adequately dealt with by Congress" and whether the type of control imposed may exist "without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce". *Parker* v. *Brown*, 317 U. S. 341, 362-363. See *California* v. *Thompson*, 313 U. S. 109, 113; *Duckworth* v. *Arkansas*, 314 U. S. 390, 394; *South Carolina State Highway Department* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 184-185. Or, as was said in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and

> the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority."

Applying this criterion, the Commissioner's order must be condemned. The problems of competition and supply in the milk industry, with which the order deals, are matters of substantial national concern, which required and have received regulation by federal authority. A restriction on purchases of milk in New York has repercussions beyond that state and affects the supply needed in Massachusetts and other states. The interest of local dealers in freedom from competition and of local consumers in maintenance of the supply do not justify the impediment which the order places on the flow of commerce.

A. THE MARKETING OF FLUID MILK IS A MATTER OF NATIONAL, NOT PREDOMINANTLY LOCAL, CONCERN

The marketing of fluid milk is essentially a multi-state activity. New York's own experience in attempting to deal with the milk problem in economic isolation demonstrated the interstate nature of the industry and the need for regulation by a single authority. The efforts of that state to stabilize the milk business within its own borders failed because it was powerless to control out-of-state competition.[2] *Baldwin* v. *Seelig*, 294 U. S. 511.

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[2] See *Report of Joint Legislative Committee to Investigate the Milk Control Law*, N. Y. Legislative Doc. (1937) No. 81, p. 15:

"The influx of interstate milk into the metropolitan area has increased from 30 per cent until it approximates at least 40 per cent of the fluid market. This has been the primary cause in the breakdown of the Milk Control Law. The State of New York is attempting to control prices in a market where it has control over the price of only 60 per cent of the product supplying the market."

The ineffectiveness of regulation by competing states led to increasing demands for federal control and resulted in the Agricultural Adjustment Act of 1935 (49 Stat. 750), reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 U.S.C. §§ 60, *et seq.*), authorizing the Secretary of Agriculture to issue orders with respect to such handling of milk as is in the current of, or directly burdens, obstructs or affects, interstate or foreign commerce.

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture has issued, and there were in effect during 1947, marketing agreements and orders regulating the handling of milk in 31 metropolitan markets (See U. S. Dept. of Agriculture, Report of the Administrator of the Production and Marketing Administration, 1947, p. 38). One of these, Federal Milk Order No. 4, as amended, regulating the handling of milk in the Greater Boston market, governs petitioner's purchases from farmers in New York (R. 30-31, 40-41). Another, Federal Milk Order No. 27, as amended, regulates handling in the New York Metropolitan Area.

The free flow of interstate commerce in milk is of vital importance to the markets in New York and to those in Massachusetts. In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550, this Court noted that "the marketing of fluid milk in New York has contacts at least with the entire national dairy industry". Obstruction of interstate trade in milk would affect about a third of

New York's supply.[3] The Boston, Massachusetts, market is even more dependent on out-of-state milk. From 1920 to 1936 about 90% of its fluid milk supply originated in states other than Massachusetts.[4] For the last ten years that percentage has remained about the same.[5]

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[3]From 1927-1936, from 20% to 40% of the total supply of the New York market came from out-of-state sources. See N. Y. Dept. of Agriculture and Markets, Agricultural Bulletin 313, *Statistics Relative to the Dairy Industry in New York State* 1935-1936, pp. 34-35. For the last five years the out-of-state supply has averaged about 28% as is shown by the following table compiled from U. S. Dept. of Agriculture, *Dairy and Poultry Market Statistics*, annual summaries 1943 to 1947 inclusive:

Year	Total Receipts (40-quart Units)	New York	Other States Volume	Other States %
1943	42,131,019	30,418,199	11,712,820	28
1944	43,410,310	30,857,862	12,552,448	29
1945	44,411,451	31,662,302	12,749,149	29
1946	46,605,451	33,910,498	12,694,953	27
1947	46,493,794	32,996,180	13,497,614	29

[4]See U. S. Dept. of Agriculture, Circular No. 16, *Some Economic Aspects of the Marketing of Milk and Cream in New England*, p. 9, Table 1; Transcript of Record in this Court in *H. P. Hood & Sons, Inc.* v. *United States*, October Term 1938, No. 772, Vol. II, p. 78.

[5]The following table, compiled from U. S. Dept. of Agriculture, *Dairy and Poultry Market Statistics*, annual summaries from 1937-1947 inclusive, shows the total volume of receipts of fluid milk at Boston, Massachusetts, from 1937 to 1947 together with the proportion of such receipts coming from Massachusetts, New York and other states:

Year	Total Receipts (40-quart Units)	Massachusetts Volume	Massachusetts %	New York Volume	New York %	Other States Volume	Other States %
1937	5,622,995	764,019	13	403,857	7	4,455,119	80
1938	5,713,973	812,332	14	390,851	7	4,510,792	79
1939	5,848,994	916,126	16	470,915	8	4,461,953	76
1940	6,107,860	942,571	15	556,437	9	4,608,852	76
1941	6,430,226	898,256	14	575,735	9	4,956,235	77
1942	7,161,182	939,194	13	645,607	9	5,606,381	78
1943	7,845,855	803,850	10	641,976	8	6,400,029	82
1944	8,286,933	629,766	8	772,824	9	6,884,341	83
1945	8,080,583	516,255	5	688,307	7	7,775,021	88
1946	9,261,954	441,929	5	690,991	7	8,127,934	88
1947	8,910,355	424,276	5	959,630	10	7,526,449	85

The State of New York is the third largest milk producing state in the nation (see U. S. Dept. of Agriculture, *Agricultural Statistics* 1946, p. 376, Table 489). Milk from that state has for years furnished, and continues to furnish, an appreciable portion of Boston's out-of-state supply. Traditionally that state, and the very area in which the petitioner has been denied a license to make interstate purchases, has been a source of Boston milk. As the testimony before the Commissioner showed, that territory was developed as the Boston milk shed (R. 38); the petitioner has bought milk there since about 1900 (R. 36); and for some twenty years the Whiting Company also shipped milk from that territory to Boston (R. 38, 44, 49).[6]

In the 1920's, New York milk constituted from 16% to 20% of milk receipts in Boston (see U. S. Dept. of Agriculture, Circular No. 16, *Some Economic Aspects of the Marketing of Milk and Cream in New England*, p. 9, Table 1). In the 1930's, New York's contribution averaged about 7% of the total receipts,[7] the drop being in part due to the aggressive competition of New York dealers (R. 49). During the last ten years, 8% to 10% of milk receipts at Boston were of New York origin, and

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[6] The extension of the Boston market into eastern New York from 1900 on is shown in the U. S. Dept. of Agriculture, Circular No. 16, *Some Economic Aspects of the Marketing of Milk and Cream in New England*, pp. 7-9. See also the Master's report in the Transcript of Record in this Court in *H. P. Hood & Sons, Inc.* v. *United States*, October Term 1938, No. 772, Vol. II, pp. 76-78.

[7] See Transcript of Record in this Court in *H. P. Hood & Sons, Inc.* v. *United States*, October Term 1938, No. 772, Vol. II, p. 78.

that proportion has been growing.[8] Of the total volume of milk handled under Federal Milk Order No. 4, as amended, milk from New York rose from 4% to 8% during the 1940-1947 period.[9] The number of New York farmers from whom milk is purchased under that Order has increased correspondingly.[10]

New York not only furnishes an appreciable portion of the Boston supply, but serves the needs of the interstate New York-New Jersey metro-

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[8]See Table, footnote 5, *supra* p. 20.

[9]See *Boston Milk Market Statistics, August 1937-December 1947*, released by Richard D. Aplin, Market Administrator of Order No. 4 (October 1948) p. 24:

TABLE 41. ANNUAL RECEIPTS OF MILK FROM PRODUCERS AND PRODUCER-HANDLERS, BY STATES (IN MILLIONS OF POUNDS)

	Massachusetts	Maine	New Hampshire	Vermont	New York	All States
1940	150.0	133.1	108.4	733.6	47.5	1,172.6
1941	149.5	137.9	105.4	780.4	49.3	1,222.5
1942	136.6	135.7	96.1	816.4	53.0	1,237.8
1943	112.8	124.2	98.6	846.3	55.1	1,237.0
1944	97.0	143.1	104.5	919.5	74.2	1,338.3
1945	85.0	141.5	101.8	964.9	82.4	1,375.6
1946	78.7	115.3	82.0	881.8	78.6	1,236.4
1947	78.2	137.2	82.9	937.8	111.9	1,348.0

[10]See *Boston Milk Market Statistics August 1937-December 1947*, released by Richard D. Aplin, Market Administrator of Order No. 4 (October 1948) p. 22, Table 29. A summary of that table follows:

TABLE 29. NUMBER OF PRODUCERS IN NEW YORK

	Average	% of Total
1940	577	3.7
1941	609	4.1
1942	604	4.2
1943	617	4.5
1944	755	5.4
1945	808	5.9
1946	837	6.7
1947	1,090	8.4

politan market.[11] Impediments on the purchase of milk in New York for out-of-state shipment can materially affect the fluid supply of important eastern cities. Similar impediments by other states would seriously prejudice New York's own supply. Local obstructions to interstate trade in milk do not have a merely local effect. They necessarily extend across state borders and reach consumers in other areas.

B. THE LOCAL INTERESTS WHICH THE COMMISSIONER SEEKS TO PROTECT DO NOT JUSTIFY THE OBSTRUCTION TO INTERSTATE COMMERCE

There is no claim that the petitioner's activities are inherently harmful or that there is need to prevent or restrict them in order to protect New York citizens from fraudulent or irresponsible dealings. *Cf. Robertson* v. *California*, 328 U. S.

[11] See N. Y. Dept. of Agriculture and Markets, Agricultural Bulletin 313, *Statistics Relative to the Dairy Industry in New York State*, 1935-1936, p. 34:

> "The New York Metropolitan market embraces large populations in both New York and New Jersey. Reasonably accurate records of receipts of milk and cream at that combined market, segregated by state of origin, have been available since 1927. Data are not available separately as to the total consumption in the parts of this market located respectively in New York and New Jersey. In 1927, New York State supplied 78.8 per cent of the milk received at that market. During succeeding years, the percentage from this state declined rapidly, dropping from 78.8 per cent in 1927 to 69.4 in 1932 and 63.1 per cent in 19[illegible]. In 1936, the proportion had risen to 63.4 per cent of the total."

See also Bulletin 339 (1938-41), p. 18 and Table 186; Bulletin 357 (1942-44) Tables 124, 128, 129, 130; U. S. Dept. of Agriculture and N. Y. Dept. of Agriculture and Markets, *Statistics Relative to the Dairy Industry in New York State*, 1947, Table 22.

440; *California* v. *Thompson*, 313 U. S. 309. The avowed purpose of the order is quite different. It is to confer an economic benefit on local dealers and consumers by protecting them from the normal consequences of interstate competition. The order rests on two grounds: First, if the petitioner takes business from producers now selling to competing dealers, it will "tend to a destructive competition in a market already adequately served" (R. 12-13), and second, if the petitioner buys milk from producers now delivering to local markets, it will tend to deprive those markets of a needed supply (R. 12). Neither of these grounds justifies restricting interstate commerce in milk.

1. *Insterstate commerce cannot be curtailed in order to protect local businesses from competition.*

There is no need to speculate as to what the New York statute means by a tendency to "destructive competition in a market already adequately served" (Section 258-e, Article 21, Agriculture and Markets Law, Appendix, *infra*, p. 49). As applied in this case, it means that when the Commissioner finds that there are enough dealers in the market all newcomers are to be excluded for the benefit of those already in the field. The findings and conclusion of the Commissioner make that clear.

The record showed that the Greenwich plant will have capacity to handle about 800 forty-quart cans daily (R. 28, 30). The petitioner proposed to have 300 to 500 cans a day delivered to that plant by producers who are currently delivering to its Eagle Bridge and Salem stations (R. 10, Finding 13; R. 42). The Commissioner did not suggest that the shift of these producers to Greenwich will have

any effect, destructive or otherwise, upon the competitive situation in the market. Whether producers now selling to the petitioner make deliveries at one or another of its stations is plainly immaterial to the petitioner's competitors. The Commissioner found, however, that the petitioner "intends to take on 20 or 30 new producers at the Greenwich plant" (R. 11, 12). Their total deliveries would amount to a maximum of 150 cans a day (R. 27). Because of the possibility that the milk of these producers might be diverted from competing dealers to the petitioner, the Commissioner determined that purchases by the petitioner at Greenwich would tend to destroy competition.

That conclusion he reached by the following chain of reasoning: There are three plants in the area operated by competing dealers and these plants can handle "more" milk (R.11, Findings 18-19; R. 12). A shift to the petitioner of 20 or 30 producers "will tend to reduce the volume of milk received at the plants which lose those producers" (R. 12). Such a reduction in volume "will tend to increase the cost of handling milk in those plants" (R. 12). (This step the Commissioner bases upon statements, of which he took judicial notice, in a report of the New York State Temporary Commission on Agriculture (Feb. 1946) and in Bulletin 473 of the Cornell University Experiment Station (R. 12) to the effect that "one of the factors" or "the most important factor" in the cost of operating a country plant is the volume of milk handled.) Finally, he asserts, any increase in competing dealers' costs will tend to destroy competition. In short, if the dealers already doing business in an area can handle all the milk produced there, any additional competition may reduce the volume of

milk they receive and thus necessarily tends to be destructive. Therefore, all newcomers must be excluded.

This reasoning is plainly "speculative and tenuous".[12] Beyond the naked assertion that any reduction in volume may result in increased costs, and that any increase in costs tends to be destructive of competition, the record does not show how the petitioner's operations at Greenwich may destroy the ability of its competitors to carry on their businesses successfully. The record contains testimony and argumentative statements from many competing dealers, much of it directed to complaints that the provisions of the federal milk order regulating the Greater Boston market gave the petitioner a competitive advantage (R. 34-5, 65), that OPA ceiling prices favored the petitioner and dealers who sold to the New York Metropolitan market (R. 53-54, 70, 75), and that the petitioner was not subject to the same health regulations applicable to dealers selling in New York state (R. 43-44, 62, 64-65; 70-71). But the record is barren of any evidence as to the actual operating costs of the three competing plants in the area, as to the extent to which the loss of 150 cans a day, or any part thereof, might increase those costs or as to the effect of increased costs on the ability of any of those dealers to compete.

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[12]The Appellate Division of the Supreme Court of New York so characterized this precise line of reasoning in *Matter of Eisenstein*, 268 App. Div. 320, 323, 51 N.Y.S. (2d) 811, 814, where, as here, the Commissioner had denied a license to purchase milk for shipment and sale out of the state on the ground of a tendency to a "destructive competition". The *Eisenstein* case has never been reversed or distinguished. It is not mentioned either in the *per curiam* opinion of the Appellate Division in the present case (R. 101-103), nor in the opinion of the Court of Appeals (R. 111-115), although it was relied on by the petitioner in both courts.

The Commissioner's order is thus based on the abstract principle that any new competition tends to be destructive in a market already adequately served. It reflects a basic philosophy that the business of milk dealing should be frozen for the benefit of those currently engaged in the market.[13] So far as purely local trade is concerned, New York may, or may not, be free to prevent the entrance of newcomers into the milk business and to restrict the market to those already in the field. *Cf. Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. That is not the issue here. Such a policy gives rise to entirely different considerations when applied to interstate

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[13]This attitude of the Department of Agriculture and Markets was referred to in the report of Robert M. Benjamin, as commissioner. *See Administrative Adjudication in the State of New York* (1942) Vol. III, pp. 37-38:

> "Some applicants have suggested that the Division's decision in a given case to decline to issue a license is based upon a preconceived notion that there are already a sufficient number of milk dealers in the State and that new applicants propose to serve a market already adequately served. Observation confirms this suggestion in so far as it relates to new applicants in urban areas. . . .
>
> ". . . The principle of limiting licenses because of the imminence of a destructive competition in a market already adequately served offends some people and the Department usually finds other grounds upon which to decide.
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> "During the calendar year 1939, out of 102 denials of new applications, only five were based on the sole ground that the market was already adequately served and that the new application would tend to a destructive competition. In thirty-five other cases, this ground was cited in connection with one or more other grounds. There is strong reason to believe that some of these contributory reasons for the refusal to issue a license were rationalizations of an initial decision that the market was already adequately served."

commerce. As was said in *Freeman* v. *Hewit*, 329 U. S. 249, 252:

> "It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

The right to engage in interstate commerce cannot be curtailed in the interest of preserving existing business from out-of-state competition. A state may not thus "suppress or mitigate the consequences of competition between the states" or "neutralize the economic consequences of free trade among the states" (*Baldwin* v. *Seelig*, 294 U. S. 511, 522, 526).

In *Toomer* v. *Witsell*, 334 U. S. 385, decided at the last Term, this Court struck down South Carolina's attempt to create a commercial monopoly for South Carolina residents in trawling for shrimp by requiring owners of shrimp boats fishing in South Carolina waters to dock at a South Carolina port and unload, pack and stamp their catch before shipping it to another state. This effort "to divert to South Carolina employment and business which might otherwise go to Georgia" and "to impose an artificial rigidity on the economic pattern of the industry" was held to be precluded by the Commerce Clause. A similar attempt by Louisiana to favor local canning and packing industries by restricting interstate commerce in raw or unshelled shrimp was invalidated in *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1. *Cf. Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375.

Nor may interstate commerce be excluded because existing businesses are able to serve the needs of a community adequately and further competition is believed "unnecessary". *Buck* v. *Kuykendall*, 267 U. S. 307; *George W. Bush & Sons Company* v. *Maloy*, 267 U. S. 317. In the *Buck* case a common carrier who sought to operate an auto stage line for the carriage of passengers and freight exclusively in interstate commerce from Seattle, Washington, to Portland, Oregon, was denied a certificate by Washington authorities on the ground that the territory was already adequately served by four other lines holding certificates from the state. The Washington statute, as thus applied, was held to be a forbidden obstruction of interstate commerce, Mr. Justice Brandeis saying (267 U. S. at 315):

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highway may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce."

Similar was the decision in the *Bush Company* case where, in refusing a certificate to an interstate carrier, the state commission had considered merely "whether or not existing lines of transportation would be benefited or prejudiced".

The Commissioner's order falls within the condemnation of these cases. Its primary purpose is to prohibit competition; it determines not how, but to what extent, interstate commerce may be conducted; it denies to the petitioner the right to purchase milk while permitting competing dealers to buy for the same purpose and in the same manner. Prejudice to existing businesses is the basis on which interstate commerce is restricted.

It will not do to say that the intended beneficiaries are New York producers, not competing milk dealers, and that competition is prevented because in the long-run it may drive down prices to farmers. There is, of course, no immediate benefit to producers who are denied the saving in hauling expense which would be realized if they delivered to Greenwich rather than to more distant plants of the petitioner or other dealers (Finding 17, R. 18; R. 41, 58-59) and who must forego "a broader and a better market" resulting from additional outlets for their milk (see *Matter of Eisenstein*, 268 App. Div. 320, 323, 51 N.Y.S. (2d) 811, 814). Nor is there any basis for the argument that ultimately further dealer competition may decrease the prices producers receive. Dealers, like the petitioner, who handle milk subject to a federal order, must pay a fixed minimum. The prices of others may be fixed by the Commissioner under the New York statute (Agriculture and Markets Law, Article 21, section 258-m).

But the short answer to any contention that producers, not dealers, are the real object of the Commissioner's solicitude is found in the holding of *Baldwin v. Seelig*, 294 U. S. 511, that the economic welfare of New York's farmers cannot be promoted by suppressing or limiting the conse-

quences of interstate competition in milk. That case was, in effect, the converse of the present. New York's attempt there was to restrict the importation of milk to insure price security for its farmers. Here it limits the right to export. The interests of milk producers furnish no more justification for the latter than for the former.

Baldwin v. *Seelig* also gives the answer to any claim that the ultimate "end to be secured is the maintenance of a regular and adequate supply of pure and wholesome milk". To the suggestion that "the state intervenes to make its inhabitants healthy, and not to make them rich", Mr. Justice Cardozo replied (at p. 523):

> "To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

2. *Interstate commerce cannot be curtailed in order to preserve a supply of milk for local consumers.*

The second ground on which the Commissioner denied the license, the possibility that local supplies might be depleted, furnishes no better support for his order. The Commissioner found that "Some Troy dealers now obtain milk in the area where applicant purchases" (R. 11, Finding 20), that "There are producers who live within 10 miles of Greenwich who now deliver their milk to

Glens Falls" (R. 11, Finding 22), and that "The supply of milk for the Troy market during the last short season of October through January [1945-6] was inadequate" (R. 11, Finding 21). On the basis of these findings, he concluded that "If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season" (R. 12).

The evidence showed that there are about 300 producers in the portions of Washington and Rensselaer counties adjacent to Troy whose milk is delivered directly by truck to the cities of Troy and Glens Falls (R. 48, 51, 53); that during the fall and winter of 1945-46 these regular truck deliveries were "inadequate" to meet the demand of the Troy market for milk and cream (R. 51-52);" and that some milk was diverted to that area from country stations which normally sold their milk elsewhere (R. 52-53). There was further testimony that the regular supply of milk of Troy, Glens Falls and Schenectady was about 90% of the demand during the 1945-46 short season (R. 60-61, 72).

This seasonal deficiency in fluid milk in 1945-46 was not a local condition, confined to the Troy area. It extended not only throughout much of the State of New York (R. 74), but was extreme in Boston, Massachusetts, and was felt in other Eastern markets (R. 34, 61). In fact, the same condition has prevailed in all Eastern metropolitan markets during the "short season" for the past four or five

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[11]Most metropolitan markets cannot be supplied with milk by direct truck delivery even in the flush season. See, *e. g.*, the finding with respect to the Fall River, Massachusetts, marketing area, 13 F. R. 3871.

years. The Secretary of Agriculture has repeatedly pointed out that since 1943 the Boston market has been inadequately supplied with fluid milk during the winter months.[15] Because of that insufficiency of supply, the Market Administrator under Federal Milk Order No. 4, as amended, has twice declared an emergency in the Boston market.[16] Similar seasonal shortages have existed during recent years in the Philadelphia market.[17]

The recurrent shortages of supply for Eastern markets during the winter months in the last few years are not due to any overall deficiency in milk production in New York, or elsewhere. In 1945, the year of the greatest winter shortage in the East, the annual production of milk in New York reached the highest point in twenty-five years (see U. S. Dept. Agriculture, *Statistics Relative to the Dairy Industry in New York*, 1945, p. 3), a record which was even increased in 1947 (U. S. Dept. Agriculture, *Statistics Relative to the Dairy Industry in*

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[15] See Decision With Respect to Proposed Marketing Agreement, Greater Boston, Massachusetts, Marketing Area, March 18, 1948, 13 F. R. 1520, 1522:

> "During the four years 1943 through 1946 shortages of milk in the marketing area have occurred each fall."

See also Decision, Greater Boston, Massachusetts, Marketing Area, June 30, 1947, 12 F. R. 4402; Notice of Report, April 4, 1946, 11 F. R. 3607, 3611.

[16] Declaration of emergency, October 11, 1946 (11 F. R. 1221), terminated January 29, 1947 (12 F. R. 489). Declaration of emergency October 29, 1947 (12 F. R. 7048), terminated March 4, 1948 (13 F. R. 1261). See also *Boston Milk Market Statistics, August 1937-December 1947*, released by Richard D. Aplin, Market Administrator of Order No. 4, pp. 11-12.

[17] See Decision, Philadelphia, Pennsylvania, Marketing Area, July 9, 1948, 13 F. R. 3971.

New York, 1947, p. 3). These shortages stem from the fact that milk production is highly seasonal, and that for the past ten years in all markets the divergence between milk receipts in the period of highest production in the spring and the low point in the fall has been increasing.[18] As the Secretary of Agriculture stated in a recent decision:

> "The total annual volume of milk produced for the New York market, and in the Northeast generally, is more than adequate to meet requirements for fluid milk and cream. Extreme seasonal variation in production, however, results in excessive supplies at one season and shortages at another season." (Decision, New York Metropolitan Marketing Area, July 23, 1948, 13 F. R. 4322, 4323.)

To remedy these seasonal deficiencies in supply, the Secretary has adopted measures to encourage the flow of milk from all sources into the Boston market during such emergency periods and to foster increased production during the short season. These measures are discussed *infra*, pp. 41 to 42. The Commissioner's order, as we there show, is in conflict with them.

If, however, deficiency of supply had been in fact peculiar to local markets in New York, and not the subject of federal regulation, the case would be no different. New York cannot restrict interstate purchases in order to preserve its milk supply, even if needed for its own inhabitants.

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[18] See, *e. g.*, Decision, Greater Boston, Massachusetts, Marketing Area, March 18, 1948, 13 F. R. 1520, 1522; Decision, New York Metropolitan Marketing Area, July 23, 1948, 13 F. R. 4322, 4323.

Pennsylvania v. *West Virginia*, 262 U. S. 553; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229. *Cf. Toomer* v. *Witsell*, 334 U. S. 385; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1. As was said in *Foster-Fountain Packing Co.* v. *Haydel*, *supra*, at 10:

> "A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, this Court considered the validity of a West Virginia statute prohibiting any pipe line company which obtained gas in West Virginia from transporting such gas out of the state until the needs of all consumers in the state were satisfied. It was established as a fact that the gas provided within the state was not sufficient to meet local requirements so that the diversion of any gas must leave some West Virginia consumers without such fuel (262 U. S. 553, 588, 589). This Court condemned the statute, saying (at p. 596-597):

> "Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference.
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> " . . . . Her [West Virginia's] present ef-

> fort, rightly understood, is to subordinate that [interstate] part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do."

Referring to the State's contention that since the supply of gas was wanting and insufficient to satisfy local needs the statute was a legitimate measure of correction, this Court replied (at p. 598):

> "If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere."

The present order is not to be distinguished on the ground that it restricts the purchase, rather than the shipment, of milk. Interstate commerce "includes the purchase quite as much as it does the transportation". *Currin* v. *Wallace*, 306 U. S. 1, 10. It "embraces all the component parts of commercial intercourse among States". *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

We submit, therefore, that the obstruction on interstate commerce which the Commissioner's effects cannot be justified on the basis of the local interests which it purports to serve.

III

The Order in Question Conflicts with Federal Regulation of the Handling of Milk

The Agricultural Marketing Agreement Act (Appendix, *infra*, pp. 52 to 59) authorizes the Sec-

retary of Agriculture to issue orders regulating the handling of certain agricultural commodities, including milk, which is in the current of, or directly burdens, obstructs or affects, interstate or foreign commerce. Declaring, in Section 1, that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers" and that such conditions "burden and obstruct the normal channels of interstate commerce", Congress stated its policy, in Section 2, to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as would establish the prices to farmers at the 1909-1914 level. Since a breakdown in interstate commerce in agricultural commodities was threatened by the collapse in farm prices and farmers' purchasing power, the remedy was to raise and stabilize prices to farmers. Through that mechanism, Congress sought to keep open the channels of interstate trade.

With respect to commodities other than milk, the chief obstacle to effective price stabilization was the existence of supplies in excess of consumer demand.[19] Therefore, the Act provided for the issuance of orders limiting the amount of the commodity which might be marketed in interstate commerce or alloting the quantity which individual handlers could purchase from producers or sell or transport in interstate commerce (Section 8c(6)).[20] See *Parker* v. *Brown*, 317 U. S. 346, 353, 367-68.

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[19] See H. Rep. No. 1241, p. 11, 74th Congress, 1st Session.

[20] *Cf.* Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 7 U. S. C. Title 7, §§1281 *et seq.*), providing for the establishment of marketing quotas for certain basic agricultural commodities; *Mulford* v. *Smith*, 307 U. S. 38; *Wickard* v. *Filburn*, 317 U. S. 111.

Quite different was the approach in the case of milk and dairy products. There the objective of the Act was to be achieved by orders fixing the prices to be paid to producers and, through equalization pools, distributing the total value of all milk sold in the market among producers supplying that market (Section 8c(5)). See *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588; *Stark* v. *Wickard*, 321 U. S. 288. No limitation on the amount of milk shipped in interstate commerce is authorized. No curtailment of the quantity of milk to be purchased by any handler is permitted. All handlers are free to purchase where and to the extent they can, subject to paying minimum prices in the manner provided in the order. Any restriction on the free flow of milk from state to state is expressly forbidden. Section 8c(5)(G) of the Act provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

That provision was inserted to make it clear beyond doubt that no artificial barriers on interstate trade in milk should be interposed.[21]

In accordance with the Act, the Secretary of Agriculture has issued orders regulating the handling of milk in many metropolitan markets, among others, Order No. 4, applicable to the

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[21] See 79 Cong. Rec., 9572-9573, 13022. *Cf.* H. Rep. No. 1241, p. 11, 74th Congress, 1st Session.

Greater Boston, Massachusetts, market (Title 7, Code of Federal Regulations, Part 904), and Order No. 27 to the New York Metropolitan market (Title 7, Code of Federal Regulations, Part 927). These orders classify milk according to its uses and establish a minimum price for each such classification, prescribe the payment of uniform prices for all milk delivered, and set up a method for adjusting or equalizing payments as among handlers so that each will pay the full use value of the milk he purchases. They apply to all purchases made by handlers selling in the market wherever those purchases are made. Thus, Order No. 4 covers all the petitioner's purchases in New York, including the proposed purchases at Greenwich (R. 30, 40-41).

The conditions which gave rise to this regulation are spelled out in the record and the opinion of this Court in the cases of *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, and *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588. Seasonality of milk production and excessive competition threatened the quality and, ultimately, the quantity of fluid milk available for consumption in metropolitan areas. The appropriate remedy for these evils was "a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples" (*United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550). That was accomplished through the price fixing and equalization provisions of the Act and the orders, which were designed "to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing." (*Ibid.* at 572).

The order of the Commissioner, we submit, is "an obstacle to the accomplishment and execution

of the full purposes and objectives" of this regulation (*Hines* v. *Davidowitz*, 312 U. S. 52, 67). We do not contend that the federal scheme leaves no room for any state regulation of milk dealers. *Cf., e. g., Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. So far as the New York statute is applied "to protect the farmer from fraud arising from the peculiar conditions under which milk is produced and sold" by assuring the honesty and responsibility of dealers (*People* v. *Perretta*, 253 N. Y. 305, 311), we do not challenge its validity. Congress has not undertaken to insure the right of fraudulent or insolvent handlers to do business. But it has undertaken to encourage interstate marketing of milk in the interest of the nation's farmers and consumers and to free it from burdens arising out of seasonality of production and excessive competition. As applied in this case, the New York statute not only covers the very field of federal regulation, but hampers the attainment of federal objectives. In its practical administration it is directly repugnant to the federal scheme.

In denying the petitioner a license to make interstate purchases at Greenwich, the Commissioner has limited the number of producers from whom the petitioner can buy and the amount of milk it can acquire for shipment from that area. He has thus restricted the availability of a source of supply for the Boston market. The need for New York milk to make up deficiencies in the regular Boston supply has been recognized by the Secretary of Agriculture, and he has refused to modify the Boston order in a manner which would limit

the availability of milk from that source.[22] The Commissioner has achieved such a limitation.

The fact that the Commissioner's order rests in part on the inadequacy of local supplies during the so-called "short" season of fall and winter emphasizes the conflict between his action and that of the federal authorities. As we have shown, *supra*, pp. 32 to 33, that seasonal deficiency has existed for the past few years in Boston and other eastern markets. To remedy that condition, the Secretary of Agriculture has adopted two measures: First, Order No. 4 was amended to authorize the Market Administrator under that Order to declare emergency periods during which the purchase of milk from producers not normally serving the Boston market is encouraged.[23] The definition of "emer-

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[22] See Notice of Report, April 4, 1946, 11 F. R. 3607, 3611, approved and adopted by the Secretary, May 29, 1946, 11 F. R. 5897. That Report states (11 F. R. 3607, 3611):

> "On the basis of the record it appears that milk is imported from plants subject to the New York order very largely to make up deficiencies in the regular Boston supply. The provisions of one Federal order, insofar as possible, should not interfere with the free flow of milk which one Federally regulated market has available and which the other such market requires."

[23] 11 F. R. 5897; 12 F. R. 4402, 4405. The Order (7 C.F.R. 1947 Supp., § 904) defines "emergency period" as that period in which the Market Administrator declares that the milk supply available from producers is insufficient to meet the demand in the market for Class I (fluid) milk (§ 904.1(a)(5)), and "emergency milk" as fluid milk received from a plant which was unregulated (i.e., not under the Order) before the emergency (§ 904.1(e)(8)). Receipts of emergency milk are treated as Class I receipts (§ 904.6(f)) (see *Boston Milk Market Statistics August 1937-December 1947* released by Market Administrator under Order No. 4 (1948), p. 11-12). Except during an emergency, "outside" milk, i.e., milk from a farmer normally delivering to other markets than Boston (§ 904.1(d)(6)), is treated as Class II milk (§ 904.5(d)). When receipts of milk from outside the usual marketing area are treated as Class I, the handler of that milk receives a proportionately higher credit to his account in the equalization pool.

gency milk" in that Order is expressly designed to permit the purchase of milk from New York or any other area during an emergency.[24] Second, the Secretary has made a basic attack on the whole problem of seasonal deficiencies by raising the minimum prices to be paid producers in the fall and winter months in order to encourage greater milk production during that season. Provisions for such higher prices have been adopted in the orders regulating the Boston market (12 F. R. 4402, 4403; 13 F. R. 1520, 1522), the New York metropolitan market (13 F. R. 4322) and the Philadelphia market (13 F. R. 3971). In this way he has attempted to augment the available supply for all markets in accordance with the policy of the Act. The Commissioner's order reflects a contrary policy. He seeks to conserve local milk for local needs and restricts any increase in milk production from entering into interstate commerce.

The very problem of the effect of competition between dealers in the overlapping New York and Boston milksheds has been a matter of continuing concern to the Secretary. When urged from time to time to establish uniform differentials and iden-

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[24] See Decision, Greater Boston, Mass., Marketing Area, June 30, 1947, 12 F. R. 4402, 4405:

> "The definitions of emergency period and emergency milk should be revised to delete any reference to the New York milkshed and make any milk outside the regular Boston supply available on an emergency basis."

See also Notice of Report, April 4, 1946, 11 F. R. 3607, 3611:

> "In defining emergency milk, no geographical limits should be designated which would restrict the source of such milk, since the prime objective during an emergency is to attract milk to the market from whatever source whether it be New England or the midwest."

tity of prices in the two markets to prevent alleged competitive advantages in favor of Boston dealers, he has found that precise alignment is not feasible, and that milk has not been unduly attracted from one area to the other.[25] At the same time he has recognized the necessity for general coordination of the prices in the two markets to prevent significant divergence in the supply-demand relations between them (see, *e. g.*, Decision, Greater Boston, Mass., Marketing Area, March 18, 1948, 13 F. R. 1520, 1524; Decision, New York Metropolitan Marketing Area, July 27, 1948, 13 F. R. 4322, 4323).[26] Throughout his administration of the orders governing these markets, he has avoided imposing any artificial restriction on the normal competition between them or giving any undue advantage to one side or the other.

The Commissioner has taken an entirely contrary course. He seeks to freeze the Greenwich supply for the benefit of local dealers and local consumers. He narrows the outlets through which producers in that area can dispose of their milk and restricts their opportunity to sell in a federally regulated market. He thus accomplishes the very results which Congress sought to prevent.

It is idle for federal regulation to fix and equalize producer prices in order to raise farmers'

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[25] See, *e. g.*, Decision, New York Metropolitan Marketing Area, June 30, 1947, 12 F. R. 4413, 4415; January 28, 1948, 13 F. R. 452, 456; July 27, 1948, 13 F. R. 4322, 4323; Decision, Greater Boston, Mass., Marketing Area, March 18, 1948, 13 F. R. 1520, 1523, 1524.

[26] As he has said (Decision, June 30, 1947, 12 F. R. 4402, 4405): "The pricing of milk under each Federal order has required the appraisal of the local conditions and the relationship of any adjacent Federal order market to the market for which prices are being established."

purchasing power and to insure the availability of milk for consumers in metropolitan markets if a state can limit interstate purchases in the interest of local dealers and consumers. By restricting the amount of milk that an interstate handler can buy, or the number of producers with whom he can deal, a state can effectively hamper the objectives and functioning of the federal milk program. Since the Commissioner's order does just that, it is invalid. *Hill* v. *Florida*, 325 U. S. 538. See *Hines* v. *Davidowitz*, 312 U. S. 52, 67; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 155-56; *McDermott* v. *Wisconsin*, 228 U. S. 115, 131-132; *Savage* v. *Jones*, 225 U. S. 501, 533.

To hold in this case that a conflict exists between the Commissioner's order and the federal policy and program, it is not necessary for this Court to take a position inconsistent with its decision in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, as suggested by the New York Court of Appeals (R. 115). Conflict between the state statute and federal milk regulation was not there in issue. Although, as the New York Court of Appeals has pointed out (R. 115), federal milk legislation had become effective and was called to the attention of this Court before its decision was rendered in that case, the Court expressly excluded from its decision any question of repugnancy between state and federal action. It said:

> "The question for decision is whether, *in the absence of federal regulation*, the enforcement of the statute is prohibited by Article I, §8 of the Constitution." (Italics supplied.)

See also *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 570-71.

The present case is quite unlike *Parker* v. *Brown*, 317 U. S. 341, which upheld the validity of a California marketing program for raisins against the contention that it conflicted with the Agricultural Marketing Agreement Act. That program restricted the amount of raisins which could be sold in California by producers to processors, who, after processing, shipped and sold the commodity in interstate commerce. There, the Secretary had not exercised his power to issue an order regulating raisins; he had reason to believe that the California program would effectuate the policy of the federal act; he had collaborated in the formulation of that program; and the program had been aided by loans from a federal agency on the Secretary's recommendation. The plan for alloting the amount of raisins to be marketed in interstate commerce coincided with the policy of Section 8c(6) of the Act which expressly provides for marketing quotas in the case of that commodity. In the present case, none of those factors are found. With respect to milk, the Act expressly prohibits any limitation on the amount that can be sold or bought. The Secretary has issued milk orders which govern the petitioner's purchases in New York. The Commissioner's order conflicts, rather than coincides, with the policy and operation of federal regulation.

CONCLUSION

The judgment of the Supreme Court for the County of Albany should be reversed.

Respectfully submitted,

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November, 1948.

APPENDIX

Article 21 of the Agriculture and Markets Law of New York:

257. *Licenses to milk dealers.* No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. Stores and farmers (including individuals and partnerships but not corporations) selling not more than one hundred quarts daily average of milk on the farm where produced to consumers coming there for it shall be exempt from the license requirements provided by this article.

258. *Application for license.* An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may classify licenses and may issue licenses to milk dealers to carry on a certain kind of business only, or limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers.

The license year shall commence on April first and end on March thirty-first following. An

application must be duly made at least thirty days before the commencement of the license year by all milk dealers then doing business, except that for the license year ending March thirty-first, nineteen hundred thirty-five, application shall be duly made within thirty days after this article takes effect by all milk dealers then engaged in business.

§258a. *License fees.* A milk dealer receiving, purchasing, handling or selling during any of the twelve calendar months immediately preceding the period for which the license is issued a daily average total quantity of milk not exceeding four thousand pounds shall pay a license fee of twenty-five dollars; and for each additional four thousand pounds of milk or fraction thereof received, purchased, handled or sold, the license fee shall be increased twenty dollars. In no event, however, shall a license fee in excess of five thousand dollars be required.

An applicant who has not previously engaged in such business shall pay the minimum license fee as provided herein for the type of business which he proposes to conduct. Any such applicant who during any calendar month of the first year covered by his license receives, purchases, handles or sells a greater volume of milk than that upon which the license fee paid by such milk dealer was based shall for each additional four thousand pounds of milk or fraction thereof pay an additional license fee of twenty dollars.

It is not the intent that milk utilized by the applicant or licensee or sold by him in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of condensed or concentrated milk, except when sold in hermetically sealed cans, and or of cream, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall

not be included in the determination of the license fee.

The commissioner may by rule or order, provide for licensing, at any rate of license fee less than the rates herein fixed, any milk dealer or class of milk dealers, generally or in a particular market, which he is authorized to exempt from license requirements.

A milk dealer who is a broker and who handles no milk physically and a milk dealer who neither buys nor sells milk but who operates a plant in which milk is pasteurized, processed or handled shall pay a license fee of twenty-five dollars.

A milk dealer which is a producers' bargaining and collecting co-operative and does not operate milk plants shall pay a license fee of twenty-five dollars.

A milk dealer receiving only milk utilized or sold in the form of manufactured products, other than condensed or concentrated milk, except when sold in hermetically sealed cans, and/or cream, shall pay a license fee of ten dollars.

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§258-b. *Bonds and enforcement.*

1. Each milk dealer buying milk from producers for resale or manufacture or receiving milk from producers on consignment for the purpose of sale or manufacture, shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

§258-c. *Granting and revoking licenses.* No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business; and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization

shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commissioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(h) Where it is shown that any statement upon which the license was issued is or was false or misleading or deceitful in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or a corporation and any individuals holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the milk dealer has violated any of the provisions of this chapter.

(l) Where the milk dealer has been duly required to give a bond or an additional bond and has failed to do so.

(m) Where the required permit from the local health officer has terminated or been revoked.

(n) Where the milk dealer has ceased to operate the milk business for which the license was issued.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally, or upon the agreement of the licensee or applicant to do or omit to do any definite act, but such condition and or agreement must have some appropriate relation to the administration of this article.

Whenever a milk dealer's license is denied or revoked there shall be filed in the office of the division of milk control a memorandum by the director or by the person who presided at the hearing given to the applicant or licensee which memorandum shall briefly state the reasons for the denial or revocation of the

license, but formal findings of fact shall not be required to be made or filed.

Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U.S.C. §§601 et seq.

Sec. 1. *Declaration of conditions.* It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

Sec. 2. *Declaration of policy; establishment of base periods for prices.* It is hereby declared to be the policy of Congress —(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prewar period, August 1909-July, 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929; and, in the case of all commodities for which the base period is the prewar period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current

deval at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

SEC. 8c. *Orders regulating handling of commodity*—(1) *Issuance by Secretary.*— The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) *Commodities to which applicable.*— Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops, honeybees and naval stores as included in sections 91 to 99 of this title and standards established thereunder (including refined or partially refined oleoresin).

* * * * * * *

(5) *Milk and its products; terms and conditions of orders.*—In the case of milk and its products, orders issued pursuant to this section shall contain one or

more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such

order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

. . . . . .

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

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(6) *Other commodities; terms and conditions of orders.*—In the case of fruits (including pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon and Idaho, and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, hops and their products, honeybees, and naval stores as included in sections 91 to 99 of this title and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product or any grade, size, or quantity thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current

quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

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(7) *Terms common to all orders.*—In the case of the agricultural commodities and the products thereof

specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers;

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

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Sec. 10. *Powers of Secretary of Agriculture generally.*

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(i) *Cooperation with State authorities; imparting information.*—The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings

with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employes under the provisions of section 8d(2) of this title.

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